In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 503

FAUSTINO HERRERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 8–12) is reported at 208 F. 2d 215.

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1953 (R. 12–13). The petition for a writ of certiorari was filed on December 19, 1953. The jurisdiction of this Court invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether Section 8 (a) 2 of the Immigration Act of 1917, as amended by the Act of March 20, 1952, Public Law 283, 66 Stat. 26, punishing the

transportation of illegally entered aliens, is void for vagueness.

2. Whether Section 8 (a) 2 of the statute set an arbitrary and capricious standard in that it punished the transportation of only those aliens whose illegal entry was known by the transporter to have occurred within the preceding three years.

3. Whether the section under which petitioner was convicted was void as establishing an unconstitutional preferred class in that another subsection provided that employment of illegally entered aliens should not be deemed to constitute harboring of such aliens.

STATUTE INVOLVED

The challenged statute as amended March 20, 1952, 66 Stat. 26, read, in pertinent part, as follows:

> Sec. 8 (a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
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> (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;
>
> (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to trans-

port or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of any alien, including an alien seaman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens,

shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

STATEMENT

In the United States District Court for the Southern District of California, petitioner was convicted on three counts charging that in November 1952, he transported three illegally entered Mexican aliens, knowing that they were

in the United States in violation of law and having reasonable grounds to believe that their last entry had occurred less than three years previously (R. 1–2, 3). He was sentenced to three years' imprisonment on each of two counts, the sentences to run concurrently, and was fined ten dollars on each of these counts. He was placed on probation under the third count (R. 3–4). The conviction was affirmed on appeal (R. 12–13).

The sole question raised on appeal and in the petition for certiorari is the constitutionality of the statute. Petitioner contends that the subsection under which he was convicted is too vague to establish an ascertainable standard of guilt, and that it sets an arbitrary and capricious standard unrelated to the object of the act, operating unequally upon persons in the same circumstances. He claims also that the exemption of employment from the definition of harboring elsewhere in the statute, sets up an unconstitutional preferred class.

ARGUMENT

1. Relying on a holding in *United States* v. *De Cadena,* 105 F. Supp. 202 (N. D. Calif.), petitioner argues that the statute is vague in that the pronouns "he" and "his" in the introductory clause of paragraph 2, i. e. "knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States" can be interpreted to refer to either the transporter of the

aliens or the alien who is transported. While it may be conceded that the construction of the statute is awkward, its meaning is clear. The subject is "any person" and the activities regulated are described by modifying "who" clauses separately set out in the four subsections. The transitive verbs in each subsection describing these activities have as their object "any alien", which appears in the fourth subsection. Properly punctuated, the object "any alien" would be placed at the beginning of a new line, with a dash after the preceding "of".[1] Punctuation may, however, be supplied, *United States* v. *Shreveport Grain & L. Co.*, 287 U. S. 77, in criminal as well as civil statutes, *United States* v. *Lacher*, 134 U. S. 624.

As to subsection (2), the knowledge must be that of the transporter, and the person who must have entered the country illegally within three years must be the alien. The clauses establish scienter, thus protecting persons who might transport unaware of the status of the aliens. Thus "he" and "his" must refer to "alien", the object of the sentence, rather than to the subject "any person." The results of any other construction would be absurd. Obviously Congress would not have felt it necessary to require that the transporter "have reasonable grounds to believe" that he himself had made an illegal entry within three

[1] Such punctuation was supplied in the reenactment of the statute as Section 274 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 228–229.

years. And obviously Congress did not intend to limit the application of the statute only to those who had themselves entered illegally.

The legislative history confirms the obvious statutory purpose. The Act resulted directly from a recommendation by the President's Commission on Migratory Labor contained at page 88 of its Report issued in 1951 that "The Immigration and Naturalization Service be strengthened by * * * (b) clear statutory penalties for harboring, concealing or transporting illegal aliens, * * *." On the basis of this recommendation the President, in his message dated July 13, 1951 (House Document 192, 82nd Cong., 1st Sess.), with respect to S. 984 which became P. L. 78, Act of July 12, 1951, 65 Stat. 119 (allowing recruiting by the Secretary of Labor of Mexicans five years in the United States), suggested that "* * * the existing provisions of law punishing transportation of illegal immigrants must be strengthened * * *." On the same day that the President's message was received, there was introduced S. 1851 which became P. L. 283.[2] House Report No. 1377 on the bill, 82nd Cong., 2nd Sess., stated (p. 2):

[2] The Immigration and Nationality Act of 1952, passed June 27, 1952, effective as of December 24, 1952, was already near final preparation at the time of the passage of P. L. 283. Congress could not wait for the comprehensive Act, however, because Mexico had stipulated with us for passage of an Act combatting the illegal immigration of her nationals in exchange for Mexico's permission for contracting her agricultural laborers for work in the United States. 98 Cong. Rec. 795, 796, 1346.

> Paragraph (2) of the same subdivision, punishing the transporters of illegally entering aliens would require knowledge that the transported alien was in the United States in violation of law and would also require proof or reasonable grounds for belief that the transported alien had entered the United States within the preceding 3 years.

Thus, the legislative history of P. L. 283 is conclusively against petitioner's strained construction.[3]

2. Petitioner contends that the Act is arbitrary and unreasonable in its provision limiting the offense to the transporting of those aliens who to the transporter's knowledge entered the country within the preceding three years. His claim is that there is no reasonable relation between the establishment of an arbitrary three-year period of illegal residence and any object sought to be obtained by the Act. He claims also that the law

[3] The Act was also designated to correct the defect in former Section 8 of the Immigration Act of 1917, 8 U. S. C. (1946 ed.) 144, found by this Court in *United States* v. *Evans*, 333 U. S. 483, in that that statute condemned harboring of illegally entered aliens but failed to provide a penalty. Petitioner quotes general language from the *Evans* decision to urge that it be found applicable to his situation. But it is abundantly clear from the *Evans* opinion that the Court struck down the statute because it would not write a criminal penalty into a statute when the legislature had omitted it, in accord with sound judicial tradition against supplying a *casus omissus*. Here the question is merely one of interpreting the language used, at most supplying punctuation.

does not operate alike upon all persons under the same circumstances and conditions.

As to the latter contention, the first answer is that the provision does operate alike on all persons similarly circumstanced in that the same penalty applies to all who knowingly transport aliens who have illegally entered within the preceding three years. Secondly, the equal protection clause is not applicable to the Fifth Amendment, *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *Currin* v. *Wallace,* 306 U. S. 1, and the provision is not so arbitrary as to violate due process.

Congress could reasonably feel that illegal entrants who had lived in this country for some time were in a different position from those who had illegally entered more recently. In authorizing agreements between the United States and Mexico respecting farm labor, 65 Stat. 119, Congress specifically authorized recruitment of illegally entered Mexicans who had been in the country five years.[4] Considering the broad power

[4] House Conference Report No. 668, 82nd Cong., 1st Sess., 97 Cong. Rec. 7538, 7539, on P. L. 78, with reference to its five-year provision states:

"This will prevent the hiring of so-called "wetbacks" under the contracts authorized by this bill but will permit those Mexicans who actually have lived for many years in the United States, even though their entry might not have conformed to legal requirements, to obtain agricultural work. The committee of conference believes that this provision is necessary in essential justice to the many Mexicans who, because of the closeness of Mexico and the United States and

of the legislature with respect to classification generally, *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, and the plenary power of Congress with respect to aliens, *Harisiades* v. *Shaughnessy,* 342 U. S. 580, the classification here made cannot be said to be unreasonable.

3. There is no merit in the contention that the section under which petitioner was convicted is void because the proviso which excludes employment from the definition of harboring establishes an unconstitutional preferred class. Since petitioner was not charged with harboring, the alleged discrimination would not be applicable to his case. *American Power and Light Co.* v. *Securities Exchange Commission,* 329 U. S. 90, 107; *First National Bank of Shreveport* v. *Lousiana Tax Commission,* 289 U. S. 60.

Moreover, the alleged discrimination cannot be called so arbitrary as to violate due process. The debate on the statute (98 Cong. Rec. 794, 797, 1348) points to a Congressional policy of providing punishment for employers who deliberately aid illegal entrance of Mexicans while avoiding imposition of penalties on farmers who might innocently hire wetbacks.

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the traditional freedom of movement across the border, may have entered the United States without complying with immigration formalities, but who have been for many years continuous and useful residents in the United States. It should be remembered that though such Mexicans may meet the requirements of this provision and be acceptable to their American employers, they still cannot be contracted without the consent of the Mexican government."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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